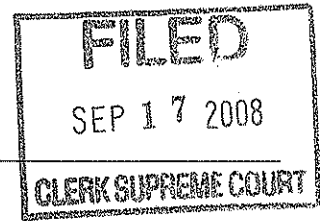


IN THE SUPREME COURT OF IOWA



IN THE INTEREST OF:

E.L.C.,

Minor Child.

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Sup. Ct. No. _____
Polk County No. JV226365

APPLICATION FOR
DISCRETIONARY REVIEW

Adjudication Hearing Date: Oct. 2, 2008

The State applies for discretionary review of a juvenile court order refusing to waive its jurisdiction over a child pursuant to Iowa Code section 232.45(6)(c) (2007), which authorizes such waiver if, among other things, the State establishes that

there are not reasonable prospects for rehabilitating the child if the juvenile court retains jurisdiction over the child and the child is adjudicated to have committed a delinquent act, and that waiver of the court's jurisdiction over the child for the alleged commission of the public offense would be in the best interests of the child and the community.

Having attached pertinent portions of the waiver transcript (Exhibit *B*) to this application, the State submits:

(1). The role of the juvenile court in delinquency cases "is primarily rehabilitation and providing [delinquent children] services that they need in order to [prevent the commission of more] delinquent acts." Tr. 28-29. In determining whether to waive jurisdiction, a juvenile court at a minimum shall consider:

(a). The nature of the alleged delinquent act and the circumstances under which it was committed.

(b). The nature and extent of the child's prior contacts with juvenile authorities, including past efforts of such authorities to treat and rehabilitate the child and the response to such efforts.

(c). The programs, facilities and personnel available to the juvenile court for rehabilitation and treatment of the child, and the programs, facilities and personnel which would be available to the court that would

have jurisdiction in the event the juvenile court waives its jurisdiction so that the child can be prosecuted as an adult.

Iowa Code § 232.45(8).

(2). In this case, the State alleged in juvenile court that seventeen-year-old E.L.C. committed three crimes within a matter of minutes on August 6, 2008, as she drove her car in Des Moines:

1 count of failure to give information and aid after her car struck a van (a simple misdemeanor, see Iowa Code §§ 321.262, 321.263);

1 count of failure to give information and aid minutes later, when she ran a red light and her car struck a motorcyclist (a Class D felony, see Iowa Code §§ 321.261(4), 321.263); and

1 count of vehicular homicide, when the motorcyclist died of his injuries (a Class C felony, see Iowa Code § 707.6(a)(2)).

Del. Petition (8/6/08); see Detention File (admitted at waiver hearing -- Tr. 39)).

(3). A detention hearing revealed that E.L.C. had been speeding when she struck the van; that she admitted she sped off to “get away” instead of stopping to give information or aid; that she ran a red light and struck the motorcyclist; that she stopped only after her car struck a telephone pole; and that witnesses pulled her from the car to prevent her from fleeing on foot. Det. Hrg. (8/7/08) State Exh. 1.

(4). After the State moved for a waiver of juvenile court jurisdiction, the juvenile court held another hearing. Undisputed evidence established that E.L.C. -- just two weeks shy of her eighteenth birthday on August 6, 2008 -- came from a good family; worked two jobs while attending high school (where she earned average grades and anticipated graduating in January 2009); lacked a juvenile record or a substance abuse history; and cooperated with authorities after her detention on August 6, 2008. Tr.

10-11, 15-18.

Undisputed evidence, however, also established that E.L.C. had embarked on a course of conduct over a few days in early August 2008 that jeopardized her safety as well as members of the community. Tr. 11-12. She ran away from home when her mother and stepfather instructed her not to drive a car she had just purchased. Tr.

30-31, 33, 34. Thereafter:

- Contrary to her mother and stepfather's instructions, she drove the car.
- Contrary to law, she drove the car without having a driver's license.
- Contrary to law, she drove the car without buying any insurance.
- Contrary to law, she fled the scene after hitting a van with her car and causing property damage.
- Contrary to law, she ran a red light, hit a motorcyclist with her car, and fled the scene only minutes after hitting the van.

Tr. 12-13, 16, 30-32; see Tr. 57. E.L.C.'s actions resulted in the death of the motorcyclist, a husband and father named James Miller.

(5). After struggling to balance the competing interests, John Hawkins -- an experienced Juvenile Court Officer (JCO) -- recommended a waiver of juvenile court jurisdiction. Tr. 6-10, 14, 23, 26, 28. If the juvenile court retained jurisdiction, the system offered only one prospect for E.L.C.: probation, for only eighteen months, the violation of which could result in punishment (and not rehabilitation) for contempt of court. Tr. 9, 10, 11; see Tr. 20-21, 22, 25-26, 27-28; see also Tr. 47, 56. If the juvenile court waived its jurisdiction, the system offered more services to E.L.C., and for a longer period of time. Tr. 9, 14, 22; see Tr. 55. Those services included probation, vocational

counseling and training, placement in a halfway house, placement in the correctional system, mental health examinations, and any other treatment or supervision condition deemed necessary. Tr. 14.

Significantly, the JCO added that “the best option that they have for someone her age would be the Youthful Offender Program,” see Iowa Code §§ 232.8(3), 907.3A, an option available only if the juvenile court waived its jurisdiction. Tr. 14, 21-23; accord Tr. 9, 25; see Tr. 49. In that program:

[E.L.C. could remain at home under her parents’ supervision while serving a period of] probation. She could continue to work. As a matter of fact, it would be a requirement that she maintain employment. It would be a requirement she complete her high school education. They would . . . require . . . her to get a driver’s license and . . . go to driver’s education and additional classes As far as that two or three-day time span [in August 2008] is concerned, there’s some thinking errors that need to be corrected.

Tr. 24.

(6). At the end of the hearing, the juvenile court found insufficient evidence that “there are not reasonable prospects for rehabilitating the child” in juvenile court upon her adjudication and that a waiver of jurisdiction “would be in the best interests of the child and the community,” Iowa Code § 232.45(6)(c). Ruling (9/3/08) (attached as Exhibit A). In rejecting the JCO’s recommendation to waive its jurisdiction, the juvenile court thus foreclosed the possibility of E.L.C. entering the Youthful Offender Program.

It explained:

[T]here’s been mention about a Youthful Offender Program. That has not been disclosed to this judge as an option in this circumstance. Even if it were, the Youthful Offender Program deals with criminal thinking youths, and to put a child that admittedly has no past criminal tendencies into that barrel of youth would not be the best usage of resources.

Tr. 78.

(7). The juvenile court's ruling constitutes an abuse of discretion. *See generally State v. Tesch*, 704 N.W.2d 440, 447 (Iowa 2005) (whether to waive jurisdiction implicates *de novo* review for an abuse of discretion: "we examine 'all the evidence to determine whether the court abused [its] discretion,'" which occurs "when the court's decision is based on grounds or reasons that are clearly untenable or unreasonable," and "we give weight to [but are not bound by] the factual determinations of the juvenile court, especially when considering the credibility of witnesses"); *State v. Speck*, 242 N.W.2d 287, 293 (Iowa 1976) (the discretion to waive or retain jurisdiction "is not an unfettered one").

Several considerations combine to establish an abuse of discretion:

First: Failure to give information or aid at an accident scene is a serious crime, and vehicular homicide is an especially serious crime that by itself warrants waiver of jurisdiction, *see, e.g., State v. Sutton*, 2001 WL 23012 (Iowa App., Jan. 10, 2001) (attached); *Iglesias v. State*, 599 So.2d 248, 249 (Fla. App. 1992). The juvenile court attached too little weight to the seriousness of E.L.C.'s crimes. *See generally* Iowa Code § 232.45(8)(a) (in ruling upon a waiver of its jurisdiction, the juvenile court shall consider "[t]he nature of the alleged delinquent act and the circumstances under which it was committed").

Second: The JCO made his recommendation to waive jurisdiction based primarily upon E.L.C.'s age and the seriousness of her crimes. Tr. 6-10, 14, 23, 26, 28. The juvenile court gave no significant consideration to the JCO recommendation, which "should be entitled to considerable weight." *State v. Greiman*, 344 N.W.2d at 251.

Third: As the JCO explained, retention of juvenile court jurisdiction would result in a single, limited option -- *i.e.*, a relatively short period of probation, enforced only by contempt proceedings -- while waiver of jurisdiction would result in multiple options. Tr. 9, 10, 11, 14, 20-21, 22, 25-26, 27-28. The juvenile court overlooked the lack of reasonable prospects in the juvenile system for E.L.C., now eighteen years old, and attached too little weight to the options available to E.L.C. if it waived jurisdiction. *See generally* Iowa Code § 232.45(8)(c) (in ruling upon a waiver of its jurisdiction, the juvenile court shall consider “[t]he programs, facilities and personnel available to the juvenile court for rehabilitation and treatment of the child, and the programs, facilities and personnel which would be available to the court that would have jurisdiction in the event the juvenile court waives its jurisdiction so that the child can be prosecuted as an adult”).

Fourth: At the outset of its ruling, the juvenile court observed that “the circumstances are such that it looks like this will be a case that will be proved either by [E.L.C.] pleading guilty to the charges or the State being able to establish that the evidence beyond a reasonable doubt establishes [her] guilt.” Tr. 76. Thereafter, the juvenile court made plain its concern about the consequences of E.L.C.’s guilt in adult court:

[Waiving jurisdiction requires this Court to consider whether it would be] in the community’s best interests because of retribution, and retribution is a valid sentencing when someone’s life has been taken away such as this. It can be in the community’s best interests to have retribution. Unfortunately the record here supports that it’s very unlikely, although this Court cannot say that, *it could be that [E.L.C.] could be sentenced to prison for this. I think it would be an unusual outcome, but it could happen, and the State would have the opportunity to argue for that to happen in a different forum if convicted.*

As part of retribution it also can be sometimes in a defendant's best interests to pay a penalty because of the lifetime circumstances when they are living with the kind of guilt that normally an empathetic person would have under these circumstances, but the State has not even made the argument about retribution, but I am acknowledging that that is a valid circumstance.

Tr. 79 (emphasis added).

The prospect of E.L.C.'s incarceration in adult court thus contributed to if not controlled the juvenile court's ruling to retain jurisdiction, even though, as the prosecutor correctly argued in closing:

This should not be a question about whether or not [E.L.C.] goes to prison or not today. [T]he question should be whether or not the adult forum is the appropriate forum, and certainly in the adult system prison is an option, but there are other options in the adult system, and I think the community [and] the victim's family, they deserve for all the options to be available [T]he question shouldn't be juvenile court versus prison, it should be juvenile court versus adult court, and that what happens to [E.L.C.] should be up to the adult court [if jurisdiction is waived].

Tr. 75.

Accordingly, the juvenile court improperly focused upon the possibility that E.L.C. faced incarceration if it waived jurisdiction and if the district court entered judgment against her after a trial or guilty plea. The possibility of incarceration exists in every case.

Fifth: Retention of jurisdiction, in fact, prevented E.L.C. from participating in the Youthful Offender Program, which the juvenile court erroneously described as a service that only "deals with criminal thinking youths" (i.e., apparently only those youths who have a criminal history). See generally 1990 Iowa Acts, 73rd G.A., ch. 1239, § 23 (the Youthful Offender Program "is established within the department of corrections to

provide for the control, treatment, and rehabilitation of offenders [between 18 and 21 years of age who] have committed a first offense”); Iowa Dep’t of Human Rights, 2001 *Youthful Offender Program Follow Up Report*, <http://publications.iowa.gov/1517> (“Youthful Offender Programs were designed . . . specifically for [youthful] offenders . . . who had committed first time felonies or aggravated misdemeanors as an alternative to incarceration or in response to non-compliant probationer behaviors”). Yet the JCO described the Youthful Offender Program -- only available if the juvenile court waived its jurisdiction -- as “the best option” in this case. Tr. 14, 21-23

To summarize: Just days away from her eighteenth birthday, E.L.C. acted as an adult in disregarding instructions from her mother and stepfather not to drive her car, leaving their home, and driving her car without either a driver’s license or insurance and without regard for the rules of the road. When she struck the van, she fled, and when she ran a red light and struck and killed motorcyclist James Miller, she fled again. E.L.C. thus committed three very serious crimes -- one resulting in a man’s death. Here, as in *State v. Greiman*, 344 N.W.2d 249, 251 (Iowa 1984), “the nature of the [criminal acts weigh] strongly in favor of waiver” even though E.L.C. admittedly had “minimal contacts with authorities prior to [their commission].”

Indeed, precedent exists for waiving jurisdiction under similar circumstances. In a case involving serious injury rather than death, this Court upheld a waiver of jurisdiction by the juvenile court, which had reasoned:

Weighing the most appropriate and respective prospects for rehabilitation, the Court [finds] that the prospects for rehabilitating [this teenager] if this Court retain[s] jurisdiction are limited and that it is in his best interests and the interest of the community that jurisdiction be waived for prosecution as an adult. *[He] is nearly [the] age of majority. Placement*

options are not available to juvenile court after age 18 even though it may continue its supervision. In the adult system services to rehabilitate, consequences for non-compliance, and the time for those consequences are greatly expanded. The intentional nature of this act, the severe nature of the act, and the consequences, when coupled with the Juvenile Court Officer's strong recommendation, weigh heavily in favor of waiver of jurisdiction.

State v. Tesch, 704 N.W.2d at 446 (emphasis added).

In view of the foregoing, the State requests this court to grant its application and grant a stay of the proceedings in juvenile court. *See generally* Iowa R. App. P. 6.201.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that a true copy of
the foregoing was

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to each party of record at their last known address

on September 17 20 08

Elizabeth R.

Westlaw.

Not Reported in N.W.2d
Not Reported in N.W.2d, 2001 WL 23012 (Iowa App.)

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State v. Sutton
Iowa App., 2001.
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK RULES BEFORE CITING.

Court of Appeals of Iowa.
STATE of Iowa, Appellee,
v.
Joseph Allen SUTTON, Appellant.
Nos. 0-588, 99-1245.

Jan. 10, 2001.

Appeal from the Iowa District Court for Scott County, David E. Schoenthaler, Judge.
Joseph Sutton appeals his conviction following a jury trial for vehicular homicide in violation of Iowa Code section 707.6A(2)(a) (1997).

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Kent A. Simmons, Davenport, for appellant.
Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, William E. Davis, County Attorney, and Jerald Feuerbach and Robert Cusack, Assistant County Attorneys, for appellee.

Heard by STREIT, P.J., and VOGEL and HECHT, JJ.

VOGEL.

*1 Joseph Allen Sutton appeals his conviction following a jury trial for vehicular homicide in violation of Iowa Code section 707.6A(2)(a) (1997). We find the record contains substantial evidence to support the verdict. However, Sutton correctly argues on appeal the trial court should have applied the weight-of-the-evidence standard in ruling on Sutton's motion for new trial and, accordingly, we reverse and remand on that issue.

Background facts.

On October 10, 1998, Sutton and two other teenagers were alternating as the driver of a car. Joseph Butler was driving when the car struck three-year-old Steven Choate, causing fatal injuries. Sutton, the front seat passenger, was seventeen-years-old at the time the incident occurred.

Sutton was waived up from juvenile court to district court and was charged with Homicide by Vehicle, under Iowa Code section 707.6A(2)(a), as an aider and abettor. A jury convicted him on this charge and the trial court sentenced him to a ten-year indeterminate term of incarceration. He now appeals on five separate grounds.

Standard of review.

The standard of review is for errors at law. *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983). A jury's guilty verdict is binding upon us unless we conclude the record lacks substantial evidence to support such a finding. *State v. Bush*, 518 N.W.2d 778, 779 (Iowa 1994). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Astello*, 602 N.W.2d 190, 197 (Iowa App.1999). Substantial evidence does not, however, denote some elevated quantity of proof. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). Rather, the relevant question in our review of the case "is whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions, which may fairly and reasonably be deduced from the record. *State v. Blair*, 347 N.W.2d 416, 418-19 (Iowa 1984). Circumstantial evidence is just as probative as direct evidence.

State v. Parrish, 502 N.W.2d 1, 3 (Iowa 1993); *State v. Garr*, 461 N.W.2d 171, 173 (Iowa 1990). We consider all the evidence at trial, not just the evidence that supports the verdict. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The jury is in the best position to assess credibility. *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995); *State v. Hulbert*, 481 N.W.2d 329, 332 (Iowa 1992). It is the jury's duty to sort out the credibility of witnesses and place credibility where it belongs. *State v. Schertz*, 328 N.W.2d 320, 322 (Iowa 1982). The jury may believe or disbelieve the testimony of witnesses as it chooses. *Blair*, 347 N.W.2d at 421. It is the jury's duty to assign the evidence presented whatever weight it deemed proper. *Thornton*, 498 N.W.2d at 673.

Sufficiency of the evidence.

*2 Sutton alleges the record does not contain substantial evidence to allow a jury to find him guilty of vehicular homicide. First, he asserts the State failed to prove the driver, Butler, was driving the car in a reckless manner, so as to cause the death of Choate. Second, he claims the evidence was insufficient to convict him, as merely a passenger, of aiding and abetting vehicular homicide. The State contends the jury was free to determine what weight should have been given to the evidence presented and render the verdict it deemed appropriate.

On October 10, 1998, Sutton was driving a black Lincoln Continental without the owner's knowledge or consent. Rather than return the car to its owner, as his mother instructed him to do, he picked up two friends: thirteen-year-old Markey Glenn and fifteen year-old Joseph Butler. The boys set out to drive around with no particular destination. Sutton allowed both of the other boys to take turns driving the car, even though none of the boys had a driver's license. Butler was driving the car when Choate was struck.

Jim Willert provided testimony for the State, as he witnessed the accident. Willert testified that he was

traveling north on Wilkes Avenue in a van pulling a stockcar on a trailer. He noticed children playing on the east side of the street and testified he was driving about fifteen miles-per-hour. Willert noticed an oncoming car and pulled between two parked cars on his side of the street, to allow the oncoming car to pass. He testified his van and trailer, at that point, were completely in his own lane.

Willert estimated the Lincoln was traveling approximately twenty-five to thirty-five miles-per-hour as the vehicles approached each other. As it passed Willert, the Lincoln tilted, appearing to travel up onto the curb. Willert's testimony was confirmed by Leon Peters from the Accident Investigation Unit, an expert for the State who determined that, based on marks left by the tires, the Lincoln had been driven onto the curb and about two feet over on the grass. As the car was passing him, Willert heard the Lincoln's engine accelerate. He also stated he looked at the Lincoln in his rear view mirror because he thought it was being driven in an unsafe manner for the conditions at that time. As he watched in his mirror, he saw a child run out from behind his trailer. The Lincoln attempted to stop but was unable to do so before striking three-year-old Steven Choate. The child was retrieved by Butler from under the left front framework of the car and laid on the hood. Sutton and the backseat passenger, Glenn, fled the scene on foot. An ambulance was summoned. Steven died later that day, from massive internal injuries.

Sutton alleges there was insufficient evidence Butler drove the car in a reckless manner, which unintentionally caused the death of Choate. Recklessness is conduct that shows a willful or wanton disregard for the safety of others. *State v. Ayers*, 478 N.W.2d 606, 608 (Iowa 1991) (citing *State v. Kernes*, 262 N.W.2d 602, 605 (Iowa 1978)).

*3 Sutton claims the Lincoln's estimated minimum speed of twenty-seven miles-per-hour through a twenty-five mile-per-hour zone does not constitute reckless conduct. Peters, the State's expert, indicated the speed of the Lincoln varied somewhat be-

cause of running up over the curb and returning to the street, attaining a speed of up to thirty-two miles per hour. The jury was free to consider all the evidence offered and find the Lincoln was traveling too fast for the circumstances of passing a large oncoming vehicle with children playing near the street.

Sutton also argues the swerving motion by Butler while passing Willert's van and trailer was a good, defensive move to avoid the oncoming vehicle. The State, however, contends the swerve up onto the curb demonstrated Butler's poor control of the Lincoln and was an unwarranted and reckless maneuver. According to Willert, it was unnecessary for the Lincoln to go up on to the curb, as he had remained on his own half of the street and there was ample room for both vehicles to pass each other. The State further alleges the swerve was merely an example of the lack of skills and ability to control the car by the young driver. It claims the swerving motion could have also been attributed to the "loose" steering on the Lincoln, which made it difficult to keep the car under control. Doug Devine, an investigating officer, tested the vehicle and confirmed the steering difficulties. According to Glenn, after the vehicles passed each other, Sutton and Butler congratulated each other with some sort of a "high-five" gesture, which the State claims only distracted the driver at a critical moment. It was just after this congratulatory gesture that Choate ran out into the street. Butler applied the brakes but the Lincoln did not stop in time and Choate was struck.

Sutton argues the accident was unavoidable because the child just ran out in front of the car. The State however, presented testimony that the front brakes on the Lincoln were barely functional, with the rear brakes being non-operational. This was supported by Officer Thomas Merritt's testimony that there was brake fluid in only one-half of the master brake cylinder. Further, Glenn testified when he was driving the car, he stepped on the brakes and almost slid through the intersection because the brakes "sort of gave out". Officer Devine testified that

when he later started the car, a red brake light came on, which should have been a warning to the driver that there was a problem with the brakes. He also testified the brakes were "mushy" and had to be pressed all the way to the floor before they would engage. He stated the poor condition of the brakes was immediately apparent to him while he was attempting to stop the car.

Leon Peters, an expert witness for the State, testified if the brakes had been in working order, they would have properly engaged and stopped the car at about thirty-five feet from the point of application. From skid marks measured at the scene, it took fifty-six feet for the brakes to stop the Lincoln. Peters further opined the child was struck at fifty feet from where the brakes were applied. Sutton presented a theory that the point of impact was much closer to the beginning of the skid marks, based on the testimony of a couple of children who saw Steven trip on a rock in the street. Sutton alleges Choate was struck early in the braking process, dragged under the vehicle and, thus, the accident was unavoidable and not attributable to the manner of the driving or faulty brakes. The State's expert determined the point of impact based on where the child was found under the stopped car and the amount and type of abrasions suffered by the child. This testimony was consistent with Willert's testimony as to where he observed Choate run into the street and his recollection of the impact.

*4 The jury was free to believe the testimony presented by the State and find the child was struck at the further point of impact and that if Butler had not been driving the vehicle with faulty brakes, the accident could have been avoided. The jury was free to find Butler had driven the car recklessly based on all of the evidence presented to it.

Sutton next contends even if the record supports Butler was driving in a reckless manner, it does not reflect sufficient evidence to find him guilty of aiding and abetting Butler's conduct. The record must contain substantial evidence to show that Sutton as-

sented to or lent countenance and approval to the criminal act either by active participation in it or in some manner encouraging it prior to or at the time of its commission. *State v. Miles*, 346 N.W.2d 517, 520 (Iowa 1984). In the present case, the record shows Sutton procured the car, failed to return it as his mother instructed, picked up Glenn and Butler instead, allowed them to take turns driving despite the fact they did not have a driver's license, drove the vehicle himself so should have been aware of the brake and steering problems, told Butler to drive around this particular neighborhood in order to avoid police contact, and witnessed Butler and Glenn's lack of control while each was driving. Further, Sutton's congratulatory or high-five gesture served to both encourage and distract Butler at a critical moment just prior to hitting Choate. We find, therefore, the record does contain substantial evidence to support Sutton's conviction of homicide by vehicle, under the theory of aiding and abetting.

Motion for new trial.

Sutton next alleges the trial court incorrectly denied his motion for a new trial based on the sufficiency of the evidence rather than using the correct weight-of-the-evidence standard. We review a denial of a motion for new trial for abuse of discretion. *State v. Atley*, 564 N.W.2d 817, 821 (Iowa 1997).

In *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998), Iowa adopted the weight-of-the-evidence standard as the appropriate measure to apply in a motion for new trial. In denying Sutton's motion for a new trial, the district court stated, "There is *sufficient* evidence in the record to support the verdict." (emphasis added). We find the record reflects the trial court incorrectly used the sufficiency-of-the-evidence rather than the weight-of-the-evidence standard. Accordingly, we reverse and order a limited remand to allow the district court to rule on the motion, applying the correct weight-of-the-evidence standard.

Ineffective assistance of counsel.

Sutton asserts his trial counsel was ineffective in failing to request jury instructions on proximate cause and legal causation. Counsel did request a general instruction on foreseeability which was denied by the trial court. Generally, ineffective assistance of counsel claims are preserved for post-conviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App.1987). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If not, we preserve the claim for postconviction proceedings so the facts may be developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App.1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). To prevail on a claim of ineffective assistance of counsel, the defendant must ultimately show that the attorney's performance fell outside a normal range of competency and that the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. McKetrick*, 480 N.W.2d 52, 55 (Iowa 1992).

*5 Sutton alleges a jury instruction on proximate cause was necessary to require the jury to find that even if Butler drove the vehicle in a reckless manner, the recklessness must have been a proximate cause of Choate's death. Generally, a defendant's conduct is the proximate cause of injury or death to another if (1) his conduct is a "substantial factor" in bringing about the harm and (2) there is no other rule of law relieving the defendant of liability because of the manner in which his conduct resulted in the harm. *State v. Travis*, 497 N.W.2d 905, 908 (Iowa App.1993) (citations omitted). The State asserts the jury was required to make such a finding in jury instruction number nineteen, which stated as follows:

The State must prove both of the following ele-

ments of Homicide by Vehicle:

1. On or about the 10th day of October, 1998, the defendant drove a motor vehicle in a reckless manner as to indicate a willful or wanton disregard for the safety of persons or property.

2. The defendant's acts unintentionally caused the death of Steven Choate.(emphasis added)

Sutton also claims a jury instruction as to legal causation should have been requested, instructing the jury that a pedestrian shall not cross a roadway outside a crosswalk without yielding to oncoming traffic. However, Sutton cannot escape criminal liability for vehicular homicide when Choate's stepping into the street was not the sole proximate cause of his death. *See State v. Hubka*, 480 N.W.2d 867, 869 (Iowa 1992). The jury clearly found Butler's reckless driving was the cause of the death. Therefore, we find Sutton's attorney did not have a duty to request an instruction on proximate cause from the trial court.

Peremptory strike.

When an appellant asserts a violation of constitutional safeguards, such as are raised here, we make our own evaluation based on the totality of the circumstances. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). This is the equivalent of a de novo review. *Id.* Sutton next contends the trial court erred in allowing the State to strike the only juror of the same ethnicity as Sutton from the jury. He claims the State failed to provide a clear, race-neutral explanation for the strike, thereby violating Sutton's constitutional right to due process through equal protection. We find the record does contain a specific, race-neutral explanation of why this juror was struck. *State v. Griffin*, 564 N.W.2d 370, 375 (Iowa 1997). Specifically, the juror articulated that he had been physically mistreated by law enforcement in the past and expressed a lack of trust in the fairness of the judicial system. He was very reluctant to serve on a jury and felt hesitant in this decision-

making capacity. Because the record so reflects a non-discriminatory reason for his dismissal, we find the trial court did not err in allowing the peremptory strike to stand.

Victim restitution statute.

Finally, Sutton asserts the victim restitution statute requiring him to pay \$150,000 in restitution to the estate of the victim violates his federal and state constitutional rights against excessive fines and to due process. *See* U.S. Const. amend. VIII; U.S. Const. amend. XIV, § 17; Iowa Const. art. I, § 17; Iowa Const. art. I, § 9. Sutton alleges because the restitution is mandatory in any case involving a felony where a death occurs, it fails to afford him a right to be heard as to the appropriateness of the penalty to his particular conviction. In addition, he argues the fine is excessive because it is not proportionate to the gravity of the offense. Earlier this year, our supreme court carefully analyzed this very issue. The court determined this statute does not violate a defendant's constitutional right to due process because in order for the fine to be imposed, the defendant must already have been found guilty beyond a reasonable doubt, or established such by entry of a guilty plea, for the underlying felony. *State v. Izzolena*, 609 N.W.2d 541, 553 (Iowa 2000). Additionally, the defendant has an opportunity for a hearing once the court issues the restitution order, or at any time during the pendency of the order. *Id.*; *see* Iowa Code § 910.7 (1997).

*6 In determining the statute does not violate the Excessive Fines Clause of the Federal and State Constitutions, the supreme court found the restitution award applies only to those deaths caused by a felonious act. *Izzolena*, 609 N.W.2d at 550.

Thus, the restitution award under the statute could not be imposed in a case involving an unintentional or negligent offender. Instead, it is limited to an offender who has demonstrated a willful and wanton disregard for the rights of others in the commission of the crime.

Id. (citations omitted). The legislature has broad discretion in determining the appropriate penalties for crimes. *Id.* The taking of another life is the most serious of all criminal offenses and the amount of the fine is not disproportionate to the circumstances of the crime. *Id.* We find, therefore, the restitution statute, as applied in this case, does not violate Sutton's constitutional rights.

Accordingly, we affirm in part, reverse in part and remand.

**AFFIRMED IN PART, REVERSED IN PART
 AND REMANDED.**

STREIT, P.J., concurs; HECHT, J., dissents.
 HECHT, J. (dissenting)

I respectfully dissent. I would preserve Sutton's claim of ineffective assistance of counsel for possible postconviction proceedings. The causation question was a crucial issue in the trial of this case. Both parties presented expert testimony as to the point of impact. Sutton sought to establish Choate entered the path of the car at a time and place that made it impossible for a driver exercising reasonable care to avoid the tragedy.

The definition of "proximate cause" in criminal cases is identical to its definition in civil cases. *State v. Hubka*, 480 N.W.2d 867, 869 (Iowa 1992). Generally, a defendant's conduct is a proximate cause of injury or death to another if (1) his conduct is a "substantial factor" in bringing about the harm and (2) there is no other rule of law relieving the defendant of liability because of the manner in which his conduct resulted in the harm. *State v. Travis*, 497 N.W.2d 905, 908 (Iowa App.1993). "Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause. *See* Iowa Uniform Jury Instruction 700.3. The district court's instructions failed to communicate these fundamental principles to the jury and Sutton's trial counsel failed to preserve error on the issue.

The majority's opinion effectively holds trial coun-

sel had no duty to object to the causation instruction because Sutton's conduct was, as a matter of law, a proximate cause of Choate's death. I disagree. Parties are entitled to have their legal theories submitted to a jury if they are supported by substantial evidence in the record. *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). Evidence is substantial enough to support a requested instruction when a reasonable mind would accept it as adequate to reach a conclusion. *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996). The issue of causation was hotly contested in this case, and a proper jury instruction on the issue was crucial to Sutton's defense. The issue of prejudice remains, however, for we will reverse only if an instructional error has caused prejudice. *Kessler v. Wal-Mart Stores, Inc.*, 587 N.W.2d 804, 806 (Iowa App.1998).

*7 The majority opinion correctly observes Sutton cannot avoid criminal liability in this case unless "Choate's stepping into the street was ... the sole proximate cause of the death." *Hubka*, 480 N.W.2d at 869. Although the jury did apparently find Sutton's conduct was a cause of Choate's death, they did so after receiving a clearly inadequate causation instruction. On this record, I cannot resolve the causation issue as a matter of law. I am similarly unable to resolve the prejudice issue against Sutton as a matter of law. Accordingly, I would preserve the issue of ineffective assistance of counsel for possible postconviction proceedings.

Iowa App.,2001.
 State v. Sutton
 Not Reported in N.W.2d, 2001 WL 23012 (Iowa App.)

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RULING OR ORDER

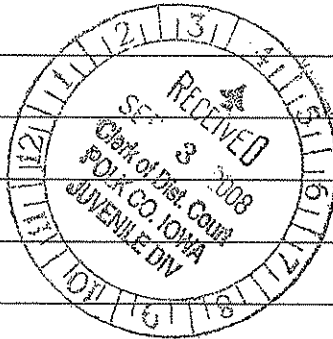
(Strike one)

CASE NO. QV 226365 DATE 09-03-08 In Re Esther Chisala

VS.

LAW _____ EQUITY _____ DIVORCE _____ CRIMINAL X

Motion to waive to adult court is denied. The Court finds the state has not established that there are ^{reasonable} no programs for rehabilitation in juvenile court. Moreover, the state has not met its burden of proving that it is in the child's and the community's best interest pursuant to 232.45 (6)(c) Iowa Code (2007) for the court to waive Esther Chisala to adult court.



Carl S. Egan
Judge

Copy: State ☒
Def. att. ☒
JCO ☒
Vic. (s) _____
Def. ☒

<input checked="" type="checkbox"/> child	<input checked="" type="checkbox"/> guardian ad litem
<input checked="" type="checkbox"/> mother	<input type="checkbox"/> attorney for father
<input checked="" type="checkbox"/> father	<input type="checkbox"/> attorney for mother
<input type="checkbox"/> other	<input checked="" type="checkbox"/> county attorney
<input checked="" type="checkbox"/> JCO	<input type="checkbox"/> grandmother/grandfather
<input type="checkbox"/> CASA	<input type="checkbox"/> DHS

Dated: 09-04-08

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IN THE INTEREST OF
ESTHER LEAH CHISALA,

A Child.

X
*
* FILE NO. JV226365
*
* TRANSCRIPT OF PROCEEDINGS
*
* Wednesday, September 3, 2008
*
X

THE ABOVE-ENTITLED MATTER came on for a Waiver hearing before the Honorable Carol S. Egly, Judge, at 1:48 p.m., on Wednesday, September 3, 2008, at the Polk County Courthouse in the City of Des Moines, Iowa.

A P P E A R A N C E S

For the State:

KEVIN BROWNELL, Assistant County Attorney
206 Sixth Avenue, Midland Building
Des Moines, IA 50309

For the Child:

KATHRYN MILLER, Attorney and Guardian *ad Litem*
Juvenile Public Defender's Office
505 Fifth Avenue, Suite 345
Des Moines, IA 50309

FILE COPY

MEGAN J. HASSEL, CSR
Official Court Reporter
500 Mulberry Street, Suite 111
Des Moines, Iowa 50309

1 A. I'm a juvenile court officer.

2 Q. What are your duties and responsibilities as a
3 juvenile court officer?

4 A. I supervise juveniles who have been -- I
5 supervise juvenile cases whose cases have been placed on
6 my case load as a result of delinquent behavior, pretty
7 much.

8 Q. How long have you been involved with working with
9 delinquents?

10 A. I've been working with delinquents now for about
11 15 years.

12 Q. How long have you been employed with juvenile
13 court services?

14 A. Just over five.

15 Q. What did you do before you were with juvenile
16 court services?

17 A. Prior to that I worked with the PACE Program
18 where I ran their GED program.

19 Q. How long did you do that?

20 A. For just under six years.

21 Q. What educational background do you have?

22 A. I have a master's in community and rehab
23 counseling. I have a bachelor's degree in criminal
24 justice. I have nearly 20 years of military service
25 where I worked with -- working with the JAG team, so I

1 have a pretty decent amount of experience and education.

2 Q. And you might have to speak up just for the court
3 reporter and everyone in the courtroom. Mr. Hawkins,
4 you authored State's Exhibit 1; correct?

5 A. Yes, I did.

6 Q. Which is the report to the Court with regard to
7 the -- on the motion to waive jurisdiction?

8 A. Yes.

9 Q. On the last page in the recommendations section
10 you recommend that Esther Chisala be waived to the
11 district court for the purpose of executing proper
12 prosecuting authority; is that correct?

13 A. Yes, it is.

14 Q. Is that still your recommendation today?

15 A. Yes, it is.

16 Q. Now, you state in the last paragraph before your
17 recommendation that you, "don't feel that there's any
18 reasonable prospect of rehabilitating this child if
19 returned to the juvenile court."

20 A. Right.

21 Q. Is that still the case today?

22 A. Yes, it is.

23 Q. Why? Why is that?

24 A. The -- my job required me to consider five
25 factors where Esther is concerned, where this charge is

1 concerned. And those five factors include that Esther
2 has been charged by way of a delinquency petition with
3 the commission of a public offense that would constitute
4 a delinquent act under the laws of the State of Iowa.
5 She meets that criteria. That Esther Chisala is 14
6 years of age or older. She meets that since she's 18 at
7 this time. She was 17 at the time of the offense.
8 There's probable cause to believe that Esther committed
9 a delinquent act as charged in the petition. There are
10 no reasonable prospects of rehabilitation of this child
11 in the juvenile court system, and I think the key there
12 is reasonable.

13 As it stands right now with her being 18 the only
14 thing that we can offer her would be probation. With
15 her being 18 we would be looking at about 18 months
16 total of supervision for her under those -- under those
17 terms and conditions, and that -- and then I also had to
18 consider, given the nature and seriousness of the
19 offense, the age of the child, and past efforts made to
20 rehabilitate this child. Based on my interactions with
21 Esther, Esther never presented -- she never presented
22 any information. I didn't find out any information that
23 indicated that Esther was in need of rehabilitation. As
24 serious as this offense is, it seemed to me to be an
25 isolated incident, an incident that took place over the

1 course of, you know, two or three days. I'm really not
2 sure how long this thing went as far as the car was
3 concerned, but she has no prior history with juvenile
4 court, and since she's been involved with juvenile court
5 she's been very cooperative with the IMPACT Program, so
6 I had to consider those things and try to balance it
7 with the seriousness of the charge. We have a situation
8 here where a man lost his life. As much as, you know, I
9 would like to see this case handled differently, I just
10 don't see where we would have a balance in the juvenile
11 court with 18 months of supervision.

12 And then the fifth criteria is that it is in the
13 best interests of the child and the community that the
14 Court waive this jurisdiction over this child and the
15 underlying offenses to the adult division of the
16 district court for prosecution in their forum. And as
17 far as that criteria is concerned, I just felt like the
18 adult court would be able to offer more services to
19 Esther, and especially in light of the fact that they do
20 have the Youthful Offender Program.

21 Q. Now, you stated that Esther's 18; right?

22 A. Yes, she is.

23 Q. In fact she turned 18 last month?

24 A. On the 18th.

25 Q. August 18th?

1 A. Yes.

2 Q. What difficulties would you have in working with
3 somebody who's over the age of 18?

4 A. The biggest difficulty that we would be facing
5 would be the idea that if she were to violate her
6 probation, that we would only be dealing with -- the
7 'only way to deal with it would be a contempt of court,
8 and which means we would have to bring her back before
9 the Court, she would have to be found guilty of
10 contempt, and then she would be looking at going to the
11 jail.

12 Q. So basically you're stating that the only option
13 you have for disposition would be to place Esther on
14 probation?

15 A. Right.

16 Q. And then if Esther didn't follow through with
17 your terms and conditions of her probation, all we have
18 is contempt of court?

19 A. Yes.

20 Q. What's the goal in juvenile court with respect to
21 children?

22 A. With respect to children it's rehabilitation, but
23 it's also treatment in those areas that we -- that we
24 believe the child is in need of our help, our assistance
25 in. And as I stated before, Esther doesn't -- let's put

1 it like this; Esther did not present or has not
2 presented like other kids that we've seen. She has no
3 prior history with juvenile court. She has no mental
4 health issues. In the last two years, if I'm thinking
5 correctly, there haven't been any problems in school.
6 As I stated before, I truly believe this was an isolated
7 incident, and I don't see where we would have under --
8 just under probation what we would be able
9 to quote/unquote, rehabilitate Esther, because I don't
10 see a need for rehabilitation. There's not a pattern to
11 rehabilitate.

12 Q. So if Esther chooses not to follow some of the
13 terms and conditions of what you set out for probation,
14 you'd be looking -- your only option would be to hold
15 her in contempt and maybe place her in jail; right?

16 A. Right, that would be the only one.

17 Q. And placing her in jail really isn't
18 rehabilitative, is it?

19 A. I don't believe that it would be rehabilitative,
20 no. It would be more punitive than anything.

21 Q. Now, going back to something you said a little
22 earlier, you stated that you thought this was an
23 isolated incident that took place over the course of two
24 or three days?

25 A. Yeah.

1 Q. What do you mean by that?

2 A. The way I'm understanding it was that she
3 purchased the vehicle that she was instructed not to
4 purchase. She drove the vehicle after her parents
5 instructed her not to drive the vehicle. It's been
6 brought to my attention that there were times where
7 during this two or three days where she wasn't -- she
8 didn't come home. She would come -- she would drive the
9 car, come home, get her clothes when her parents would
10 be at work, and then leave before they would get back
11 home. So as I said before, this wasn't something that
12 happened -- it wasn't just a 30-second situation, but it
13 was a series of bad decisions on her part.

14 Q. So who instructed her not to buy the car?

15 A. If I'm thinking correctly, her parents told her
16 not to.

17 Q. And who told her not to drive it?

18 A. Her parents.

19 Q. Was she staying in her home at the time of
20 this --

21 A. I don't believe so. I talked with the intake
22 officer, and the intake officer is Christy Opatz who
23 handled the case initially, and this is where this
24 additional information is coming from. And I may have
25 it -- I may not have it exactly correct, but I don't

1 believe she was staying at the home at the time.

2 Q. Do you know where she was staying?

3 A. No, I don't.

4 Q. But -- or you've been told that it wasn't at
5 home?

6 A. Right.

7 Q. Are you aware of -- are you aware of why she
8 wasn't staying at home?

9 A. I'm not exactly aware of it, but I believe it had
10 something to do with the car.

11 Q. Did Esther have a driver's license at the time of
12 this -- the time that she committed the vehicular
13 homicide?

14 A. No.

15 Q. Did she have car insurance?

16 A. No.

17 Q. Do you know if that was also part of the
18 intention between her not driving the car -- do you
19 believe that was also part of the contention between her
20 and her parents as it relates to driving the car?

21 A. Based on my interaction with the parents, I
22 believe that those were probably the primary reasons
23 why.

24 Q. Have you in the course of writing your report,
25 which is State's Exhibit 1, did you research what

1 options would be available in the adult system?

2 A. Yes, I did.

3 Q. I think you've alluded to at least a couple of
4 options, but can you tell the Court what options you
5 found in your research?

6 A. Well, they're actually written, a list of them
7 written in the report. It would be on the fourth page,
8 it says, "Services available in the adult court system."
9 They include probation, vocational counseling and
10 training, placement in a halfway house, placement in a
11 correctional system, a correctional institution, to
12 include Fort Des Moines Correctional Facility, mental
13 health examinations, and any other treatment or
14 supervision condition that the adult court would deem
15 necessary. And I believe that the best option that they
16 have for someone her age would be the Youthful Offender
17 Program.

18 Q. But either way it's -- we have a lot -- there's a
19 lot more options available in the adult court than we
20 have here in the juvenile court; right?

21 A. Yes, in light of the seriousness of the charge
22 and her age at this time.

23 Q. In fact, would we be able -- would the adult
24 system be able to work with her longer than the juvenile
25 system could?

1 A. Yes, they could.

2 MR. BROWNELL: Thank you, I have no further
3 questions.

4 THE COURT: Ms. Miller.

5 MS. MILLER: Thank you.

6 **CROSS-EXAMINATION**

7 **BY MS. MILLER:**

8 Q. Mr. Hawkins, were you able to ascertain what kind
9 of family involvement Esther has, I guess what her
10 history of family involvement is?

11 A. The history involvement of the family, her
12 history involvement with the family was as far as I was
13 concerned based on my interactions with them, was great.
14 In light of what they were able to tell me during my
15 interview, this incident, especially over the last
16 couple of years, is something that came out of the --
17 came out of nowhere. I don't think they expected it,
18 and as I said before, I believe that this was an
19 isolated incident. The family gets along well. Esther
20 gets along with her sisters. She indicated that her
21 sister, her older sister, was like her big -- her best
22 friend. The family indicated that she gets along well
23 with her brothers. When they rated their
24 relationships -- when she rated her relationship with
25 her parents on a scale of 1 to 5, 1 being terrible, 5

1 being great, they were right around 4 and 5 for each
2 parent and her siblings. There's opportunities for her
3 to interact with the extended family. She gets along
4 extremely well with the grandparents, and I mean, there
5 was nothing there to say that it wasn't a good family.

6 Q. So it sounds like there was an issue right about
7 the early part of August about a car?

8 A. Yes.

9 Q. And Esther was almost 18?

10 A. Yes.

11 Q. Do you know what she was using -- well, do you
12 know what she was doing on August 6th when she was
13 driving? Do you know where she was going?

14 A. I'm not sure where she was going, no.

15 Q. You don't know if she was driving to work that
16 day or what she --

17 A. That's possible that she was going to work
18 because they reported that Esther has been able to hold
19 down jobs, and if I'm thinking correctly she's holding
20 down two jobs right now.

21 Q. And I gather from your report that she had a
22 history of working since she was 15?

23 A. Yes.

24 Q. Since Esther's release from detention what has
25 been her level of cooperation with the IMPACT Program

1 and you?

2 A. She's done everything that we've asked her to do.
3 IMPACT actually provided me with a report today, and
4 she's progressed through the levels, you know, well.
5 There hasn't been any problems with her making her
6 curfew calls and checking in like she's supposed to.
7 They're aware of where she is when she's supposed to be
8 there. There are no problems.

9 Q. No concerns?

10 A. No concerns.

11 Q. You also indicated from your report that there's
12 never been any history, from what you've been able to
13 ascertain, of the usage of illegal substances?

14 A. No.

15 Q. Or alcohol?

16 A. Huh-uh. The family reported, and Esther
17 reported, that she's never used illegal substances, and
18 that she only tried alcohol once.

19 Q. Now, your report indicated there's been some
20 problems with school prior to November of 2006; is that
21 correct?

22 A. Yes; yes.

23 Q. And since then she's been in the Future Pathways
24 Program?

25 A. Yes.

1 Q. And were you able to talk to people at school
2 about how she's been doing there?

3 A. Well, I had reports from the school and there
4 have been -- it's almost -- it's kind of strange.
5 Her -- the school report went from like four or five
6 pages of consistent problems in school to nothing. I
7 mean, it cut off in 2006, and there's nothing else there
8 after 2006.

9 Q. So you aren't aware of any problems with school
10 since 2006?

11 A. No, I'm not.

12 Q. And what kind of -- are you aware of any positive
13 aspects of her school since 2006?

14 A. Positive aspects of school include her attending
15 Central Campus, completing the Central Campus program in
16 fashion design if I'm thinking correctly. Pretty
17 decent, average grades. She's on track to graduate in
18 January. There were a couple of people at school that
19 she considered to be people that she could talk to if
20 she needed to. Overall school seemed to be -- seemed to
21 have changed from this very negative influence in her
22 life to something, you know, halfway positive.

23 Q. Do you know if Esther ever took driver's
24 education in school?

25 A. No, I don't.

1 Q. You don't know?

2 A. No.

3 Q. Now, since release from detention has -- you said
4 Esther has been working?

5 A. Yes.

6 Q. And do you know if that was the same job she had
7 before she went to detention?

8 A. I believe it was.

9 Q. So at least her employer did allow her to come
10 back to work?

11 A. Right.

12 Q. I think your report also indicated that Esther
13 had just enlisted in the National Guard on August 5th --

14 A. Yes.

15 Q. -- is that correct? That was the day before this
16 tragedy?

17 A. Yes.

18 Q. Do you know what her plans were with respect to
19 that?

20 A. If I'm thinking correctly she was -- the plan was
21 to go to basic training in February, and in an
22 administrative position if I'm thinking correctly and
23 going to the Reserves, but that's -- I can't recall
24 right now.

25 Q. Do you know if Esther had any plans for higher

1 education?

2 A. She expressed an interest, but I don't think
3 there was anything in place as far as a plan.

4 Q. I think your report indicated also Esther has a
5 sense of the seriousness of this offense. What -- how
6 do you -- what causes you to make that conclusion?

7 A. Well, one, the fact that she's willing to
8 cooperate right now. When I did the interview and --
9 when I did the interview and we touched on the subject,
10 there was a reluctance, a hesitation to really talk.
11 And then one of the things that she stated to Christy
12 Opatz, again, who's the intake officer who handled the
13 case initially, she expressed that she was nervous and
14 she was concerned about both families.

15 Q. When do you mean by "both families"?

16 A. About her family and the victim's family.

17 Q. Now, if I understand your position with respect
18 to whether or not there could -- Esther could be
19 rehabilitated in the juvenile court process, it is that
20 she can't be because she doesn't really have any need
21 for rehabilitation?

22 A. Right. There wasn't -- there's not anything that
23 stands out that says this is what we would need to work
24 on in juvenile court in order to give her the assistance
25 she needs.

1 Q. Now, you did have a chance to read Dr. Webb's
2 report, State's Exhibit 2?

3 A. Yes, I did.

4 Q. And she indicates some depression, feelings of
5 hopelessness, that sort of thing. It's my understanding
6 that that is related to this event?

7 A. Right.

8 Q. That necessarily was not necessarily present
9 before?

10 A. Right. And as far as services that we would be
11 able to provide her, it would be -- counseling would be
12 included, but it would be a result of this incident. It
13 wouldn't be something that she would have to address
14 prior to this incident.

15 Q. Is it -- do you have an opinion as to whether
16 Esther poses any risk to the community at this point in
17 time?

18 A. No.

19 Q. You don't have an opinion?

20 A. I thought you were asking me if I thought she was
21 a risk. My opinion is that, again, I think I've said
22 this a couple of times, that I believe, and it's just my
23 personal opinion/professional opinion, that this was an
24 isolated incident, and I don't see -- I don't think that
25 we could expect Esther to go out and do this again.

1 Q. Or what about committing other crimes?

2 A. No.

3 Q. If I understand your position also, Mr. Hawkins,
4 the, as you would say -- well, let me I guess first ask
5 you, what do you see as the benefits to the community of
6 Esther's waiver to adult court?

7 A. The biggest benefit is that services could be
8 provided, whatever they may be in the adult system,
9 based on the seriousness of this charge. I don't -- as
10 much as I want to give Esther credit for the things that
11 she's done, I can't get over the fact that there was a
12 life that was lost in this situation. The adult system
13 would be able to provide Esther with whatever services
14 she needs on a longer basis. Regardless of what we did
15 in juvenile court we would still be confined to 18
16 months no matter what.

17 Q. And you expressed an opinion that you don't
18 really believe that Esther needs to be in prison?

19 A. Right, I don't believe that. This, I still -- I
20 want to make sure that everybody is clear that I
21 understand, there's a life that was lost here, and
22 again, it's an isolated incident, but I don't think it
23 warrants prison time. It definitely warrants
24 consequences and services, not necessarily prison.

25 Q. Okay. Would it be fair to say then that you

1 don't think it would necessarily benefit the community
2 or the people of the state of Iowa, if you will, for
3 Esther to be in prison?

4 A. No, I don't see how that would benefit anyone.

5 Q. And certainly not Esther in your opinion?

6 A. Certainly not Esther.

7 Q. My conclusion from reading your report is that it
8 was not an easy one, and required some real struggle on
9 your part to make a recommendation about what to do
10 here?

11 A. Yes, it was.

12 Q. At this point in time I guess it would be what
13 you would see as Esther's needs. If I may, she needs to
14 complete her education, her high school?

15 A. Yes.

16 Q. Would that be a need of her's? Do you think
17 employment would be a need, that she would have to
18 maintain her employment skills?

19 A. Yes.

20 Q. Do you believe that Esther needs to continue
21 under the supervision of her parents?

22 A. Yes.

23 Q. Were you able to ascertain anything in the family
24 home that would indicate that that is not a proper
25 environment for her to be in?

1 A. No.

2 Q. And that she would not receive the kind of
3 supervision and structure to the best of their ability
4 in that home?

5 A. No. Can I say this?

6 Q. Certainly.

7 A. If Esther were to be waived to the adult court
8 and end up -- and was given the opportunity to enter the
9 Youthful Offender Program, all of those things could
10 continue on. She could be placed on probation. She
11 could continue to work. As a matter of fact, it would
12 be a requirement that she maintain employment. It would
13 be a requirement she complete her high school education.
14 They would make it, require it, for her to get a
15 driver's license and petition to go to classes where --
16 go to driver's education and additional classes that
17 they have in order to address some of those issues. As
18 far as that two or three-day time span is concerned,
19 there's some thinking errors there that need to be
20 corrected.

21 Q. Okay. And another need I guess of Esther's is
22 that she needs to continue to mature?

23 A. Yes.

24 Q. Grow up?

25 A. Uh-huh.

1 Q. And perhaps need counseling to address some of
2 the issues that she's dealing with right now?

3 A. Yes.

4 Q. Do you believe that Esther can be successful
5 under your supervision in doing these things that we've
6 talked about?

7 A. Well, I believe she could be.

8 Q. And obviously you believe she could also be
9 successful in another program, such as the Youthful
10 Offender?

11 A. Yes.

12 Q. And do you have doubts that whatever it is that
13 this Court or you would require of her to do, that she
14 would make her best effort to do?

15 A. I don't have any reason to believe that she
16 wouldn't.

17 Q. And you mentioned contempt of court. I guess
18 from that I presume that if the Court would order her to
19 do some certain things and she failed to do those, she
20 could be found in contempt of court?

21 A. Yes, and could be in jail, yes.

22 Q. Sentenced to jail?

23 A. Yes.

24 Q. Do you know about how long the Youthful Offender
25 Program can last -- I'm sorry -- Youthful Offenders are

1 under that program?

2 A. I can't give you -- I'm not sure a hundred
3 percent, but I believe I heard that it was five years.

4 Q. Okay. And Mr. Hawkins, ultimately you make your
5 final recommendation in looking at all these things,
6 primarily based on a man lost his life?

7 A. The seriousness --

8 Q. And the fact that she was almost 18 at the time?

9 A. The seriousness of the charge, that the gentleman
10 losing his life, and Esther being 18 at the time of the
11 offense.

12 Q. Mr. Hawkins, is it -- whether or not Esther would
13 go to prison or not would not -- would not be under your
14 control?

15 A. No.

16 Q. If she were waived to adult court?

17 A. Right, it wouldn't be under my control.

18 Q. Whether or not she would be involved in the
19 Youthful Offender Program would not be under your
20 control?

21 A. No, it would not.

22 Q. Whether or not she would be under the supervision
23 of adult probation would not be under your control?

24 A. Right.

25 Q. Do you know how adult probation services compare

1 with juvenile probation services?

2 A. I don't necessarily understand your question.

3 Q. Yeah, and I'm just wondering if you do know how
4 an adult on probation, what the requirements are and how
5 that compares with the juvenile probation?

6 A. No, I don't. I haven't had any interactions with
7 the adult probation officers to that extent.

8 Q. But all of these things that we've talked about
9 that Esther completing high school, continuing to work,
10 receiving counseling, continuing under the supervision
11 of her parents, continuing under the supervision of the
12 Court, continuing under the supervision of probation,
13 receiving counseling if necessary, and maturing and
14 growing up were all things that you could do?

15 A. Yes.

16 MS. MILLER: Thank you. I have nothing
17 further.

18 THE COURT: Mr. Brownell.

19 **REDIRECT EXAMINATION**

20 **BY MR. BROWNELL:**

21 Q. Mr. Hawkins, I believe you answered Ms. Miller's
22 question that you believe that Esther should remain
23 under the supervision of her parents; right?

24 A. Yes.

25 Q. If Esther was to remain in the juvenile court,

1 what if she decides not to remain under the supervision
2 of her parents? What can you do to her?

3 A. Basically nothing. She would have to be found in
4 contempt of her probation.

5 Q. What happens if Esther -- what happens if she's
6 under your supervision and she decides not to finish up
7 her high school education? What can you do to her?

8 A. The same thing would apply.

9 Q. Would that be contempt or nothing?

10 A. It's either contempt or nothing.

11 Q. How about if Esther decides to stop working?
12 What can you do to her?

13 A. The same, contempt or nothing. And I think I
14 indicated that in my report, that in this case is
15 either -- it's one of those situations where it's either
16 all or nothing, and I didn't really feel like there was
17 a middle ground in this. And due to the seriousness of
18 the charge, I felt like the adult court would be the
19 best -- the best solution for her.

20 Q. Now, I believe you stated that Esther should
21 receive some consequences for these -- for the tragedy
22 that occurred on August 6th. Are you equipped as a
23 juvenile court probation officer to give her these -- to
24 give her the consequences that she needs?

25 A. No. It's not necessarily in -- juvenile court's

1 role in a kid's life is primarily rehabilitation and
2 providing the kids the services that they need in order
3 to no longer continue to commit delinquent acts. The
4 goal is to ultimately keep them out of the adult system.

5 MR. BROWNELL: Thank you. No further
6 questions.

7 MS. MILLER: Nothing further.

8 THE COURT: You may step down. Next
9 witness, Mr. Brownell.

10 MR. BROWNELL: I call Thomas Orman.

11 THE COURT: Please raise your right hand.
12 Whereupon,

13 **THOMAS ORMAN,**
14 called as a witness on behalf of the State of Iowa,
15 having been first duly sworn by the Court, was examined
16 and testified as follows:

17 THE COURT: Please have a seat.

18 **DIRECT EXAMINATION**

19 **BY MR. BROWNELL:**

20 Q. Please state your name for the record.

21 A. My name is Thomas Orman.

22 Q. What's your relationship to Esther Chisala?

23 A. I'm her stepfather.

24 Q. How long have you been Esther's stepfather?

25 A. Since '99, nine years, August of '99.

1 Q. So you were -- have you lived with Esther for the
2 last nine years?

3 A. That's correct.

4 Q. You were present in the courtroom when
5 Mr. Hawkins testified; correct?

6 A. Yes, I was.

7 Q. You were present when he testified that from the
8 information that he has, that there were some -- that
9 you and maybe your wife had some issue with Esther
10 buying a car?

11 A. Not with her buying it. No, not with buying it.

12 Q. Did you have an issue with Esther driving the
13 car?

14 A. Yes, we did.

15 Q. Did you tell her not to drive the car?

16 A. Yes. Yes, I did.

17 Q. Why did you not want her -- why did you not want
18 her to drive the car?

19 A. Well, she didn't have a license, and you know, we
20 were going to get insurance and everything for her when
21 she had a license, and I had no problem with her having
22 a car if it was parked. She was a week away from that.
23 You know, she just had a lot to do. It was hard for her
24 to get around, and --

25 Q. Did you direct Esther to not drive the car?

1 A. Yes, I did.

2 Q. How did Esther react when you told her that?

3 A. Oh, she wasn't too happy. The end result was she
4 ran and got in the car and drove away, and that's the
5 last I saw of her until the accident.

6 Q. About how long before the accident did she run
7 away?

8 A. A few days.

9 Q. Like a week?

10 A. I can't really -- you know, half a week.

11 Q. So like three or four days?

12 A. Yeah.

13 Q. When you told her not to drive the car, did she
14 assault you in any way?

15 A. Well, to tell her not to drive the car I grabbed
16 her by the arm, and she twisted out of my grasp. She
17 kind of freaked out when I grabbed her, and we kind of
18 collided. That's when she kind of bolted from the car,
19 but she really didn't strike me. I think she was just
20 scared and it was heating up real quick, so --

21 Q. When she ran away did you know where she went?

22 A. No.

23 Q. Do you know now where she went?

24 A. No.

25 Q. Prior to her running away and driving the car in

1 spite of your instruction not to, have there been any
2 other behavioral issues with -- between you and Esther?

3 A. Well, there was a time like when she was in
4 eighth grade she wanted to stay over at her friend's
5 house or stay over late and stuff, and we had some
6 issues over that, but -- and you know, but that was
7 short lived. That seems to be a pretty regular thing.
8 Then the normal thing about grades and attendance and
9 stuff like that in school, but you know, you'd tell her
10 to do the dishes, she'd complain, but she'd do the
11 dishes, you know. It seems like she was a pretty
12 typical teenager, adolescent.

13 Q. Isn't it true that when Esther was arrested for
14 the vehicular homicide that you didn't know whether or
15 not you could even speak to her at the police station?

16 A. Yeah, I didn't know if I had that right.

17 Q. And was it also because she wasn't living with
18 you at the time?

19 A. No, it was because I'm a stepfather and I'm not a
20 father, and I have a sister who's married to a guy other
21 than her kids, the second husband, and he told me he
22 can't -- he's got no rights over her children, I don't
23 know. So I didn't know if I had a parental right to
24 speak to her at that point. So I just figured, you
25 know, we have other children so that's why my wife went

1 and spoke to her the day of the accident, and I went
2 home and fed the other kids.

3 Q. When Esther ran away and stayed with other
4 individuals, did you know what her intention was as far
5 as coming back?

6 A. Well, I figured we'd see her. She had two jobs.
7 She'd just joined the Guard. It wasn't like I thought
8 oh, Esther's out doing drugs or something. Esther's
9 just hard working. She's driven. She just had a little
10 too much to do, you know, for her ability to get there,
11 I guess. But I'm sure I would have seen her, oh, yeah.
12 I mean, you know, it's, you know --

13 Q. Did you anticipate her continuing to go to school
14 even though she wasn't living with you?

15 A. Well, you know, it's not like she had moved out.
16 She just wasn't -- she was staying with a friend, let us
17 call it that. I anticipated her going to school because
18 I knew she joined the Guard and that was one of their --
19 that's what the Guard required is she has to have a high
20 school diploma, so she was joining, and that was
21 conditioned upon eventually getting her diploma. So I
22 knew she'd finished high school. I didn't see that as
23 much of a problem.

24 MR. BROWNELL: Thank you. I have no further
25 questions.

1 MS. MILLER: Thank you.

2 CROSS-EXAMINATION

3 BY MS. MILLER:

4 Q. So Mr. Orman, you don't -- you didn't think that
5 Esther had moved out, you just had had a disagreement
6 about the car?

7 A. Yeah, she was staying with pals. I mean, you
8 know, that's -- like I said, I don't worry about -- it's
9 not like I worry about her sitting in an opium den
10 somewhere. I mean, that wasn't the concern, and, you
11 know --

12 Q. To your knowledge Esther's never been involved
13 with any drug usage or illegal drug usage?

14 A. No, none.

15 Q. Never been involved in any criminal activity?

16 A. No, no. She's not like that.

17 Q. And was working two jobs at that time?

18 A. Yes.

19 Q. How did she get back and forth before she got the
20 car? How did she --

21 A. Well, I don't know. One of the jobs she got --
22 the job she has now, I believe she had a friend who
23 worked there that got her the job and she'd go with her
24 friend, and then her sister started working there. And
25 then her friend left and her sister left, and, you know,

1 A. We'd welcome the opportunity. Yes.

2 MS. MILLER: Thank you, nothing further.

3 THE COURT: Mr. Brownell?

4 MR. BROWNELL: No other questions.

5 THE COURT: You may step down. Next
6 witness.

7 MR. BROWNELL: Your Honor, could we take a
8 five-minute recess?

9 THE COURT: We'll break until a quarter of
10 3:00.

11 (Recess taken at 2:40 p.m.)

12 (Back on the record at 2:50 p.m.)

13 THE COURT: Mr. Brownell, your next witness.

14 MR. BROWNELL: Your Honor, the State has no
15 additional witnesses.

16 THE COURT: Ms. Miller.

17 MS. MILLER: Your Honor, first of all
18 Mr. Brownell and I did have an agreement that prior
19 record made before this Court at the detention hearings,
20 the two prior detention hearings, the witnesses and
21 exhibits that were admitted into evidence there could be
22 incorporated into the record today.

23 THE COURT: All right. I will judicially
24 note all past proceedings. For the benefit of those
25 that were not present, those included a letter from

1 A. She had somewhat of a blunted affect. I think
2 she was somewhat detached from what was occurring,
3 concerned that this was not going to be something that
4 she could survive.

5 Q. And by a blunted affect, do you mean sort of just
6 a withdrawal, if you will, or --

7 A. Yeah, that would be a way to describe it.

8 Q. Is that something that might be referred to as a
9 defense mechanism?

10 A. It could be very easily.

11 Q. And what -- okay. Is it a reaction a person
12 might have to stress?

13 A. It's not surprising given what was going on and
14 that she had not experienced anything like this in the
15 past; that to a certain extent humans shut down to
16 survive.

17 Q. Dr. Webb, what -- did you make an assessment as
18 to whether Esther had any rehabilitation needs at this
19 time?

20 A. From a mental health aspect she does not.

21 Q. You mentioned that she may have a need for
22 counseling to address some of her feelings of
23 hopelessness and worry and sadness; is that correct?

24 A. In the future they would probably be beneficial.

25 Q. And is that related to the events of August 6th

1 A. Somewhat.

2 Q. Okay. I'm going to ask you what your
3 understanding of that is.

4 A. I understand there's kind of a stepping process.
5 There's the waiver to the adult system where an
6 individual then is treated as an adult by the legal
7 system with the same consequences that a person over 18
8 would receive, and then there's also the Youthful
9 Offender is an option that's somewhat between the
10 juvenile system and the adult system that can provide
11 some services, but wouldn't necessarily have the type of
12 consequences the adult system would have.

13 Q. Okay. What benefits, if you have -- if you know,
14 would there be to the community have Esther be handled
15 in the adult system?

16 A. I know of no benefits.

17 Q. Now, I presume it would be fair to state one of
18 the let -- a legitimate benefit of the adult system may
19 be retribution or punishment?

20 A. Correct.

21 Q. Okay. Do you believe there would be any
22 detriment to the community or the people of the state of
23 Iowa if Esther were waived to the adult court system?

24 A. I believe there is the potential given that prior
25 to this event, from all the information I received,

1 normal way of functioning.

2 Q. Is it fair to say that she at the very least
3 probably had some apprehension about fully opening up to
4 you?

5 A. I would expect that, yes.

6 Q. Would it be fair to say that if she was to engage
7 in counseling, that it would take some time before
8 Esther would be able to fully open up to whoever was
9 going to be providing that counseling?

10 A. Likely.

11 Q. So the -- well, do you know if she was to do some
12 sort of counseling, how long it would take before she'd
13 be at a point where she no longer needs counseling?

14 A. There's no way to estimate that.

15 Q. Are you aware in juvenile court that especially
16 with someone over the age of 18, that we're dealing with
17 some pretty limited time constraints?

18 A. I am.

19 Q. And if it takes some time for Esther -- do you
20 know is Esther engaged in counseling today?

21 A. I do not know.

22 Q. If it takes some time for Esther to get before a
23 counselor, it's going to take some time before she
24 actually gets fully engaged in that counseling; right?

25 A. Correct.

1 Q. Now, you state in your report, which was entered
2 today as State's Exhibit 2, that she may benefit from
3 some mental health services at some time in the future.
4 What will determine whether or not she does have some
5 mental -- whether or not she'll benefit from mental
6 health services?

7 A. As she matures and understands the impact of this
8 decision she made, as she deals with whatever
9 consequences the Court may impose, if she becomes more
10 hopeless about her ability to have a future or more
11 depressed about what occurred, counseling and
12 potentially medication would be beneficial.

13 Q. Would the only way to really know that is -- or
14 time will tell whether or not she would actually need
15 that; right?

16 A. Exactly.

17 Q. In looking through your resume, or it might be
18 your curriculum vitae, you don't have any background in
19 adult services, do you?

20 A. No.

21 Q. So it's hard for you to -- or basically you can't
22 testify as to what the adult system can provide?

23 A. I cannot.

24 Q. Now, you testified as to criminal thinking and
25 what exactly criminal thinking is; is that correct?

1 of proof, Mr. Brownell, you get the last word.

2 MR. BROWNELL: Thank you, your Honor.

3 This should not be a question on whether or not
4 Esther goes to prison or not today. I think the
5 question should be whether or not the adult forum is the
6 appropriate forum, and certainly in the adult system
7 prison is an option, but there are other options in the
8 adult system, and I think the community, I think the
9 victim's family, they deserve for all the options to be
10 available, whether it's prison, whether it's probation,
11 whether it's something in between. I think that the
12 question shouldn't be juvenile court versus prison, it
13 should be juvenile court versus adult court, and that
14 what happens to Esther should be up to the adult court.

15 So the State would ask that she be waived to the
16 adult court. Thank you.

17 THE COURT: The Court has been asked by the
18 State of Iowa to waive Esther to adult court. The
19 incident occurred before she was 18 years of age. That
20 means that it starts in juvenile court. It falls on
21 this Court to make the decision as to whether the best
22 place for this to be tried, and I'll go through the
23 reasons that the law makes me consider, should be in
24 juvenile court or adult court.

25 At this point there are only allegations. The

1 charges have not been proved, although I will state that
2 by all the indications of the evidence and by Esther's
3 own statements, the circumstances are such that it looks
4 like this will be a case that will be proved either by
5 Esther pleading guilty to the charges or by the State
6 being able to establish that the evidence beyond a
7 reasonable doubt establishes Esther's guilt.

8 With that, I'm mandated by law to make certain
9 considerations. We'll only talk about the ones that are
10 really at issue. The State has the burden of proving,
11 since Esther was under 18 before this occurrence, that
12 the -- there are not reasonable prospects for
13 rehabilitation in juvenile court. That's the first
14 thing. The evidence in this circumstance is unusual and
15 sort of backwards. Generally the circumstances that
16 would establish that there's no reason -- ability to
17 rehabilitate in juvenile court are a child has had
18 juvenile court involvement because of previous crimes
19 and we've tried everything we can to rehabilitate and
20 nothing has worked and crimes have continued. It's rare
21 to have testimony such as I do in this circumstance that
22 the JCO basically believes that there are no
23 rehabilitative needs, that this was an isolated
24 incident, that there might be supervision needs, but
25 that these are thinking errors that led to this

1 prospects of rehabilitation in juvenile court. Ms.
2 Miller has put forward a plan that will be required
3 because the parents are willing that there be probation
4 in juvenile court in which Esther is required to reside
5 at home and follow the home rules, as well as the
6 supervision of the probation office. This would give
7 her the chance to mature. I'm not so worried about
8 Esther's counseling. There's no indication that the
9 counseling is to prevent criminal acts. That's only
10 talking about counseling for Esther's own circumstances
11 because of what has occurred here.

12 The other two things that the State must prove
13 are that it is in the child's best interests and the
14 community's best interests to waive the child to adult
15 court. I will say that the record supports nothing that
16 indicates that would be in Esther's best interests. I
17 think that pretty much is self-evident, but I will state
18 there's been mention about a Youthful Offender Program.
19 That has not been disclosed to this judge as an option
20 in this circumstance. Even if it were, the Youthful
21 Offender Program deals with criminal thinking youths,
22 and to put a child that admittedly has no past criminal
23 tendencies into that barrel of youth would not be the
24 best usage of resources.

25 The other option the Court believes is more

1 telling, and it's probably the one that we have to think
2 about, is would it be in the community's best interests
3 because of retribution, and retribution is a valid
4 sentencing when someone's life has been taken away such
5 as this. It can be in the community's best interests to
6 have retribution. Unfortunately the record here
7 supports that it's very unlikely, although this Court
8 cannot say that, it could be that Esther could be
9 sentenced to prison for this. I've been in the criminal
10 court system for over 20 years. I think it would be an
11 unusual outcome, but it could happen, and the State
12 would have the opportunity to argue for that to happen
13 in a different forum if convicted.

14 As part of retribution it also can be sometimes
15 in a defendant's best interests to pay a penalty because
16 of the lifetime circumstances when they are living with
17 the kind of guilt that normally an empathetic person
18 would have under these circumstances, but the State has
19 not even made the argument about retribution, but I am
20 acknowledging that that is a valid circumstance.

21 However, the State has the burden under the law
22 of waiver. They have to prove both that it is in the
23 child's best interests and the community's best
24 interests if the act occurred before the child was 18
25 under the circumstances here, and the State has not met